Lim Ban Lee v Tan Yueh Goh

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 945 OF 1989
YONG PUNG HOW J
5 FEBRUARY 1990

Land Law — Joint tenants — Whether court should order one joint tenant to execute mortgage on land — Other joint tenant constructing building on land for rental — Supreme Court of Judicature Act (Cap 322, 1985 Ed), s 18

The plaintiff, who is the son of the defendant, is a joint tenant with the defendant of a piece of land ('the property'). The property was purchased by both of them as joint tenants. Initially, the plaintiff wanted to build a home on the property for his immediate family. Pursuant to this, construction work on the house commenced. Later, the plaintiff changed his intention about building a family home and was intending to build a residential property to rent out. He was, however, unable to complete the construction because of a lack of funds. He therefore applied to court for an order against the defendant that she execute jointly with him a further mortgage on the property to a bank in order to secure payment of a further sum of money to be advanced to the plaintiff to enable him to complete construction.

Held, dismissing the plaintiff's application:

(1) The court has jurisdiction under s 18 of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) to order property to be mortgaged or charged, but the onus of proof is on the applicant to satisfy the court that it should exercise this jurisdiction.

(2) For this purpose, an applicant mush show that there is a legal right which can and should be enforced, or in all the circumstances, the applicant is deserving of being granted such an order by way of equitable relief.

(3) The plaintiff should never have commenced construction of the building. There was no justification for him to press on with the construction, regardless of the known opposition of the joint tenant, when the original purpose of the construction had disappeared.

(4) It may well be that on economic considerations, the property might be worth more now with a completed building on it earning rent, but this was by no means certain as property prices fluctuated. For the court to order a further mortgage would be an improper exercise of its jurisdiction.

Legislation referred to
Supreme Court of Judicature Act (Cap 322, 1985 Ed) ss 18, 34(2)

Michael Khoo for the plaintiff.
Robert Yu for the defendant.

Cur Adv Vult

Yong Pung How J: The plaintiff, who is in fact the son of the defendant, is a joint tenant with the defendant of a piece of land in Mukim 4, Ulu Pandan, known as lot 4409, containing an area of 2,049 sq m comprised in Certificate of Title Volume 273 Folio 172 ('the property'). The plaintiff seeks the following orders against the defendant:

(1) that the defendant execute jointly with him a further mortgage of the property to the Overseas Union Bank Ltd to secure payment of a further sum of $800,000 to be advanced to the plaintiff as a construction loan to enable him to complete the construction of a bungalow on the property;

(2) that the defendant execute jointly with him after completion of construction of the bungalow all necessary documents required by the authorities to enable the issuance by them of all permits and certificates for the occupation of the bungalow;

(3) that the Registrar of the Supreme Court be authorized to execute jointly with the plaintiff the further mortgage and all necessary documents in the event that the defendant refuses to execute the same within seven days of being ordered to do so.

The relevant facts, most of which are in dispute, are contained in the plaintiff's affidavit filed on 6 November 1989, two affidavits by the plaintiff's solicitors filed on 10 November 1989 and 24 November 1989, and the defendant's affidavit filed on 24 November 1989, together with their respective exhibits. These show that some time in April 1987 the parties purchased the property as joint tenants for $1,040,000. In view of the nature of this action and the court orders which are sought, the reasons for the purchase of the property and the resulting co-ownership of it as joint tenants, and the use to which the property was intended to be put, are important.

The plaintiff in his affidavit claimed initially that the purchase was made because it was his intention to build on the land a home for his immediate family. He had told the defendant of his intentions because they were then all living together, because the defendant was his confidante, and because he wanted to fulfil a filial duty to her. He had also told her that after the building was completed she could come and live with him; but she had told him that she would like her name to be included in the title deeds, if she was to stay with him, hence the co-ownership as joint tenants. By the end of the same affidavit, however, the plaintiff was claiming that the delay in completion of the building had caused him economic loss, as he had not been able to let out the premises for rental, which was 'necessary to enable me to obtain money to repay part of the loan and interest'. So, somewhere along the line, and before this action was begun, the plaintiff had discarded his original plan of building a family home for his immediate family, and was intending to build a residential property to be rented out.

The defendant's explanation in her affidavit of the reasons for the purchase was more straightforward and to the point. She said that the plaintiff and his family used to live together with her at 53 Namly Garden, Singapore. She and her deceased husband had purchased and used

this property as a family home, and she and the plaintiff are now co-owners of it as tenants in common. In 1987, she agreed with the plaintiff to purchase another piece of land jointly to build a new family home, and at all times there was no question but that she and the plaintiff were to be the owners of it in equal shares.

The affidavits do not provide a complete picture of how the total purchase price of $1,040,000 was raised. The plaintiff in his affidavit said that a sum of $234,243.15 was paid by cheque, and the balance was financed by a loan of $750,000 on the joint account of the co-owners with the Overseas Union Bank Ltd. This however left a sum of $55,756.85 of the purchase price unaccounted for. The loan was then secured by a mortgage on the property dated 3 June 1987 which was executed by both co-owners and was registered on 4 August 1987. The plaintiff did not claim to have made any payment himself towards the purchase price, and confined himself in his affidavit to saying that the defendant did not contribute any money to the purchase. This incomplete picture was partly completed by the defendant. In her affidavit, she disclosed that the plaintiff had in fact made the initial payments for the purchase by drawing out money from the family account in Lee Kong Chye Goldsmith (Pte) Ltd, which was a family business in which she and the plaintiff had equal shares. To illustrate this, she exhibited two cheques of the company drawn on the Overseas Union Bank Ltd on 13 April 1987 for $24,000 and on 1 June 1987 for $130,243.15. According to her, none of the cheques in payment of the purchase price were from the plaintiff's own account.

As to the intended use of the proposed building, the defendant alleged that, as the property was purchased both for the plaintiff and for her, she had taken part fully in the planning discussions with the architects. Special provisions had been made for her needs; because she was a Buddhist, she had asked for two prayer rooms, and these had be included in the building plans.

Within six months after the purchase of the property, however, the plaintiff and defendant fell out. This arose over the plaintiff's extra-marital relationship with a married woman, who was then an employee in the family business. As a result of this change in the family relationships, the defendant moved out in January 1988 from the family home at 53 Namly Garden; more importantly, she decided not to continue with the construction of the bungalow, which was then still in the planning stage. When the plaintiff asked her in January or February 1988, as co-owner, to sign an application form to the Development and Building Control Division of the Public Works Department ('DBCD') for permission to commence building operations, she had the form returned, unsigned, by her solicitors to the plaintiff's then solicitors under cover of a letter dated 11 February 1988.

Notwithstanding the defendant's refusal to sign the application form to the DBCD, it appears that such an application form, completed and bearing what purported to be the defendant's signature, was received a few days later on 22 February 1988 by the DBCD, which then issued the necessary permit to commence building operations on 26 February 1988. On 29 March 1988, on the defendant receiving a copy of the permit which was issued, her solicitors queried the DBCD on the issue of the permit, and also informed them of her decision not to proceed with the construction. The evidence in the affidavits is not entirely clear or complete as to what actually happened after this. The defendant lodged a police report that her signature had been forged on the application form, but construction work appears to have been allowed to commence. A suspension order was then issued by the DBCD on 9 November 1988, by which time the building was about 80% completed. Further, this suspension order was lifted on 28 August 1989.

If the information on how the total purchase price of the property was raised is not complete, the information on how the building construction costs have been met is no more complete. The only information on this aspect of the matter was provided by the defendant in her affidavit filed on 24 November 1989. She alleged that she had discovered in late October 1988 that the plaintiff had opened a special account in Lee Kong Chye Goldsmith (Pte) Ltd, and through this account had used the company's money to pay the builders who were carrying out the construction of the bungalow. To illustrate this, her affidavit exhibited a folio from the company's 1988 cash book showing that in the period from April 1988 to September 1988 the plaintiff had taken out from the company in this way sums amounting to $453,250.

Whatever might be the sources of funding for the building construction, because of the delay in the completion of the bungalow the costs of building construction had escalated, and a further sum of $497,950 was required by the contractors to complete the works. There was also an outstanding bill of $43,903.84 from the Public Works Department for the apportioned cost of road widening expenses, together with an undisclosed sum in respect of arrears of interest on the original loan. Taking all these sums into account, the plaintiff needed, and therefore sought, to borrow from the bank a further sum of $800,000, this time on her personal account. This was to be secured however by the defendant executing jointly with him a further mortgage to the bank to secure the further sum, thereby increasing the mortgage on the property from $750,000 to $1,550,000.

At the hearing of the originating summons before me on 5 December 1989, the plaintiff's counsel tendered a written submission, and also addressed me on the plaintiff's case. He clarified that questions of ownership would be

dealt with in another Originating Summons No 247 of 1988. He submitted that the plaintiff's application in the present case was based solely on expediency; it was in the best economic interest of both parties, as well as the safety and well-being of the neighbouring properties. The building was 80% completed, and the court should enable the plaintiff to complete it. No case authorities were cited to me, however, and no argument was advanced to me that this was a case in which there was jurisdiction to order a sale, and therefore also a case in which the court would be empowered to order the property to be further mortgaged under 18(2)(d) of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) ('the Act').

It cannot be disputed that in a proper case, the court has jurisdiction under s 18 of the Act to order property to be charged or mortgaged, but the onus of proof is on the applicant to satisfy the court that it should exercise this jurisdiction. For this purpose, an applicant must show that there is a legal right which can and should be enforced, or that in all the circumstances the applicant is deserving of being granted such an order by way of equitable relief. In my judgment, the plaintiff has not done this, and has not discharged the onus of proof on him. In this case, even leaving aside the question of whether or not the defendant's signature on the application from was genuine or forged, the plaintiff should never have commenced construction of the building. There was no justification whatsoever for him to press on with the construction, regardless of the known opposition of the joint tenant, when the original purpose for the construction had evaporated.

It may well be that on economic considerations, the property might be worth more now with a completed building on it earning rent; but property prices fluctuate and the experience of the last two recessions has shown that developed land may not necessarily be worth more than if it had been left in its undeveloped state. A sensible solution to this problem might have been to reach agreement to sell the property, even in its unfinished state, and then to settle the account between the parties, but this is not a matter before this court. What the court has been asked to do, on these facts, is to encumber the joint property with a further mortgage of $800,000 for the benefit of one of the co-owners. For the court to order a further mortgage of the joint property in such circumstances would, in my opinion, be an improper exercise of its jurisdiction. Even for this troubled family, it would only make things worse, and further complicate an already complicated situation. Accordingly, I dismissed the application with costs.

I should add that the plaintiff has appealed to the Court of Appeal and, as a preliminary step, under s 32(2) of the Act, applied on 6 December 1989 for further argument. On the same day the plaintiff was asked by the registrar to comply with Practice Direction No 1 of 1987 paras (1) (c) to (f). The plaintiff was reminded again on 8 January 1990 that on his complying with the practice direction, consideration would be given to whether further argument would be required. To date the plaintiff has not complied with the Practice Direction.

Application dismissed.

Solicitors: *Michael Khoo & BB Ong; Low & Robert Yu.*

Reported by *Terence Tan Bian Chye*

Four Seas Communication Bank Ltd v Sim See Kee

HIGH COURT (SINGAPORE) — APPEAL IN SUIT NO 86 OF 1987
RAJAH J
22 MARCH 1989

Conflict of Laws — Proper law of the contract — Whether contract unenforceable due to a breach of the Malaysian Exchange Control Act 1953/art VIII s 2(b) of Bretton Woods Agreements Order 1966

Exchange Control — Whether contract unenforceable due to a breach of the Malaysian Exchange Control Act 1953

Words and Phrases — 'Exchange Contract'

The plaintiffs were a bank incorporated in Singapore. The defendant was a resident in Malaysia. The plaintiffs advanced moneys and extended credit facilities to the defendant in his overdraft account in the plaintiffs' bank. The overdraft account was operated in Singapore and the moneys involved were in Singapore currency. Summary judgment was obtained by the plaintiffs against the defendant for moneys advanced and credit facilities extended. The defendant was appealing against the summary judgment. The defendant argued that the loan:

(i) was unenforceable due to a breach of s 4(1) of the Exchange Control Act 1953 (Rev 1969) of Malaysia; and
(ii) a breach of art VIII s 2(b) of the Bretton Woods Agreements Order 1966.

Held, dismissing the defendant's appeal:

(1) Based on the facts, the proper law of the contract was that of Singapore. If the contract was lawful by the proper law and lawful in the place of performance, it is immaterial that the party liable to perform would by doing so violate the laws of the foreign country in which he is a resident or carries on business or of which he is a national. The result is that a borrower or lender could be committed to perform a contract even though the contract violated the laws of the country of its incorporation, eg an exchange control law, provided that there is an external proper law and the illegality does not arise where payment is to be made.

(2) The advances did not contradict art VIII s 2(b) of the Bretton Woods Agreements Order 1966 as the said Order applies to 'exchange contracts'. The term 'exchange contracts' should be